

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

DANIEL KLEEGERG, LISA STEIN,
and AUDREY HAYS,

Plaintiffs,

v.

LESTER EBER; ALEXBAY, LLC f/k/a
LESTER EBER, LLC;
CANANDAIGUA NATIONAL
CORPORATION d/b/a
CANANDAIGUA NATIONAL BANK
& TRUST; ELLIOT W. GUMAER,
JR.; EBER BROS. & CO., INC.; EBER
BROS. WINE AND LIQUOR
CORPORATION; EBER BROS. WINE
& LIQUOR METRO, INC.; EBER-
CONNECTICUT, LLC; and WENDY
EBER,

Defendants.

AFFIRMATION OF
ROBERT B. CALIHAN

Civil Action No.: 1:16-cv-09517

HON. LEWIS J. KAPLAN

ROBERT B. CALIHAN, an attorney duly admitted to practice law before this Court,
does hereby affirm the following under the penalties of perjury:

1. I am counsel for Defendant Elliot W. Gumaer in this proceeding. I make this
affirmation in support of Mr. Gumaer's application for an order dismissing the claims against
him in this action.

2. The claims against Mr. Gumaer arise out of his role as trustee of the Allen Eber
Residuary Trust ("Trust") (Complaint ¶¶12, ¶¶85-88). The claims against co-defendant
Canandaigua National Bank ("Bank") arise out of its role as trustee of the Trust (Complaint ¶12,
¶¶85-88). There is a common nexus of allegations against both trustees. (Complaint ¶¶85-88).

3. On March 3, 2017 the Bank moved to dismiss the claims pursuant to Federal Rule
of Civil Procedure 12(b)(1) for lack of subject matter jurisdiction under the Probate Exception

and/or the Colorado River Abstention Doctrine and pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. Because the claims against the Bank and Mr. Gumaer all arise out of their respective trustee roles and a common set of allegations, Mr. Gumaer joins the Bank's motion to dismiss the claims and respectfully submits that he is entitled to dismissal of the claims against him on the same grounds as set forth in the motion papers by Canandaigua National Bank & Trust, specifically: Notice of Motion (Dkt. No. 38); Memorandum of Law in Support of Defendant, The Canandaigua National Bank and Trust Company's Motion to Dismiss Complaint (Dkt. No. 38-3); and Declaration of William G. Bauer, Esq. in Support of Canandaigua National Bank Corporation's Motion to Dismiss (Dkt. No. 38-1).

4. Because Mr. Gumaer is relying on the memorandum of law filed by the Bank and incorporating it herein by reference, he respectfully submits that his reliance on the Bank's memorandum of law satisfies the memorandum of law requirement set forth in Local Rule 7.1.

Dated: March 28, 2017
Rochester, New York

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